No. 157

In the Supreme Court of the United States

OCTOBER TERM, 1963

R. B. PARDEN, ET AL.,
Petitioners,

v.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT, ET AL.,
Respondents.

Motion of the States of Louisiana and Virginia for Leave to File Amici Curiae Brief in Support of Respondents' Petition for Rehearing

BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

JACK P. F. GREMILLION,
Attorney General State of Louisiana
2201 State Capitol
Baton Rouge, Louisiana
(Attorney for State of Louisiana)
AMICUS CURIAE

ROBERT Y. BUTTON,
Attorney General State of Virginia
State Capitol
Richmond, Virginia
(Attorney for State of Virginia)
AMICUS CURIAE

Of Counsel,
JAMES E. PHILLIPS, JR.

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CASES AND STATUTES CITED

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The States of Louisiana and Virginia through their Attorney Generals, Jack P. F. Gremillion and Robert Y. Button respectively, respectfully move this Honorable Court for leave and permission to file amici curiae brief in support of Respondents' Petition for rehearing in the above numbered and captioned cause, pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States.

Suggestions in support of this motion are submitted with attached brief.

JACK P. F. GREMILLION,
Attorney General State of Louisiana
2201 State Capitol
Baton Rouge, Louisiana
(Attorney for State of Louisiana)
AMICUS CURIAE

ROBERT Y. BUTTON,
Attorney General State of Virginia
State Capitol
Richmond, Virginia
(Attorney for State of Virginia)
AMICUS CURIAE

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The interests of Louisiana and Virginia in maintaining and protecting their right to plead sovereign immunity in defense of suits brought against them by private persons without their express consent is adversly affected by the decision of this Court rendered May 18, 1964, in the above numbered and captioned cause. Thus, Louisiana and Virginia have a vital interest in urging this Court to grant respondents' petition for rehearing.

ARGUMENT

I

CONGRESS CANNOT ACT UNILATERALLY SO AS TO SUBJECT A STATE TO SUITS BY ITS CITIZENS OR CITIZENS OF ANOTHER STATE BY EXERCISE OF ITS POWER TO REGULATE INTERSTATE COMMERCE.

The States did surrender a portion of their sovereignty to a higher sovereign when they adopted the Constitution of the United States, which granted Congress the power to regulate interstate commerce, but the States made it absolutely clear that they did not intend by adopting the Constitution to surrender their historical defense of sovereign immunity to suits brought against them by individuals when they subsequently adopted the Eleventh Amendment to the Constitution. Although the Eleventh Amendment is not by its terms applicable here since Petitioners' are citizens of Alabama, the majority opinion specifically acknowledges that this court has consistently held the same immunity spelled out in the Eleventh Amendment, also exists in favor of a State when suit is brought against it by its own citizens.

How then can this Court find in the Congress the power to create a cause of action in favor of an individual against a State when the Constitution as amended by the Eleventh Amendment provides that the judicial power of the United States shall not be so construed. The answer is that this Court cannot do so and still remain within the framework of the Constitution. That the power of Congress to regulate interstate commerce could be so limited was recognized in the landmark case of *Gibbons v. Ogden*, 9 Wheat. 1, 196-197.

> "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation,

OTHER THAN, ARE PRESCRIBED IN THE CONSTITUTION. . . ."
(Emphasis ours).

The majority opinion overlooks or brushes over this seldom encountered but clearly set out limitation on the congressional power to regulate interstate commerce. This is perhaps due to the fact that the restriction is narrow and it therefore seldom interferes with congressional legislation enacted to regulate interstate commerce. Evidence of this is found in the many cases cited by the majority in its opinion, as instances in which federal regulations of interstate commerce were applied to state-owned railroads. We freely admit, that congressional statutes regulating railroads in interstate commerce are applicable to such railroads whether they be state-owned or privately-owned, so long as the statutes are construed and interpreted within constitutional limits. Thus, we do not take exception to or argue with the decisions of this Court cited in the majority opinion such as *United States v. California*, 297 U.S. 175, which was a suit brought by the United States to enforce provisions of the Federal Safety Appliance Act or to the case of *California v. Taylor*, 353 U.S. 553, which was a suit brought against the members of the National Railroad Adjustment Board to compel them to take jurisdiction over the railroad under the Act. In none of these cases was this court enforcing a cause of action by an individual against a State without its express consent. No clear constitutional limitation to the power of Congress to regulate interstate

commerce was at issue in those cases as it is in the instant case.

II

THE FEDERAL EMPLOYERS LIABILITY ACT DOES NOT CREATE A CAUSE OF ACTION IN FAVOR OF AN INDIVIDUAL AGAINST A STATE-OWNED RAILROAD.

It is apparent that Congress never intended that the FELA should create a cause of action in favor of an individual against a State without its express consent. The House Report, H.R. Rep. No. 1386, 60th Cong. 1st Sess. (1908) states:

> "The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employee, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. It permits a recovery by an employee for an injury caused by the negligence of a co-employee; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury."

In considering the above quoted statement by Congress itself concerning the intended purpose and scope of the FELA, it should be especially noted that

prior to enactment of the FELA an employee of a state-owned railroad had no cause of action at all at common-law against his employer without its express consent. State-owned railroads did not have to depend, as did privately-owned railroads, on any common-law defenses, such as contributory negligence or the fellow-servant rule, to escape liability for injuries to its employees. All state-owned railroads had to do to successfully defend such actions was raise the defense of sovereign immunity. It is inconceivable in the face of these facts to conclude as the majority of this Court did that Congress intended by its enactment of the FELA to strip the States of this jealously guarded right of defense, when not even a hint of such intent can be gleaned from the legislative history of the Act.

Therefore, even assuming that Congress might constitutionally grant such a cause of action to employees of state-owned railroads by making the waiver of their sovereign immunity from such suits a condition precedent to their engaging in or continuing to engage in operating railroads in interstate commerce, it is certain that Congress has not yet done so.

CONCLUSION

It is apparent that the majority of this Court erred in holding that the FELA should be read as authorizing suit in Federal District Courts against state-owned as well as privately-owned common car-

riers by railroad, engaged in interstate commerce, and respondents' petition for rehearing should be granted.

JACK P. F. GREMILLION,
Attorney General State of Louisiana
2201 State Capitol
Baton Rouge, Louisiana
(Attorney for State of Louisiana)
AMICUS CURIAE

ROBERT Y. BUTTON,
Attorney General State of Virginia
State Capitol
Richmond, Virginia
(Attorney for State of Virginia)
AMICUS CURIAE

Of Counsel,
JAMES E. PHILLIPS, JR.

PROOF OF SERVICE

I, Jack P. F. Gremillion, Attorney General of Louisiana, Attorney for the State of Louisiana, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have mailed a copy of the foregoing motion for leave to file brief amici curiae, and a copy of the amici curiae brief in support of respondents' petition for rehearing to the Honorable Al G. Rives and the Honorable Timothy M. Conway, Jr., counsel of record for petitioners by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This, the ____day of June, 1964.

JACK P. F. GREMILLION